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Settlement of commercial disputes

UNCITRAL Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)

Note by the Secretariat

1. In accordance with the deliberations of the Commission at its second,[1] third,[2] thirty-first,[3] forty-first,[4] forty-fourth[5] and forty-fifth[6] sessions where it promoted the dissemination of information and the harmonization of the application of the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards[7] ("New York Convention") as well as the preparation of a guide on that convention, this note and its addenda contain the text of the guide on the New York Convention. At its forty-sixth session, the Commission requested the Secretariat, resources permitting, to submit the guide to the Commission for further consideration of the status of the guide and how it would be published.[8]

2. By way of background, the issue of providing guidance on the New York Convention has been on the agenda of the Commission since its very first sessions. For instance, at its second session, in 1969, "the general opinion was that the most effective course for the Commission would be to concern itself with problems of

[1] *Official Records of the General Assembly, Twenty-fourth session, supplement No. 18* (A/7618), para. 107.
[2] Ibid., *Twenty-fifth Session, Supplement No. 17* (A/8017), para. 151. See also A/CN.9/42.
[3] Ibid., *Fifty-third Session, Supplement No. 17* (A/53/17), para. 234.
[4] Ibid., *Sixty-third Session, Supplement No. 17* and corrigendum (A/63/17 and Corr.1), paras. 355 and 360.
[5] Ibid., *Sixty-sixth Session, Supplement No. 17* (A/66/17), para. 252.
[6] Ibid., *Sixty-seventh Session, Supplement No. 17* (A/67/17), paras. 135-136.
[7] United Nations, *Treaty Series*, vol. 330, No. 4739.
[8] *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 17* (A/68/17), para. 140.

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practical application and interpretation of existing conventions, since those conventions were interpreted in various ways and it would be desirable to encourage a uniform interpretation as far as possible. Reference was made in particular to the difficulties in connection with the interpretation of article II of the United Nations Convention of 1958".[9] The desirability of addressing the issue of the uniform application of the New York Convention was reiterated at the third session of the Commission, in 1970.[10] At the thirty-first session of the Commission, in 1998, it was observed that the Convention had become an essential factor in the facilitation of international trade and that, besides the legislative enactment of the Convention, it would be useful for the Commission also to consider its interpretation. Such consideration, together with information to be prepared by the Secretariat for that purpose, would serve to promote the Convention and facilitate its use by practitioners. It was stressed that information on the interpretation of the Convention was not available in all the official languages of the United Nations and that, therefore, the Commission was the appropriate body to prepare it.[11]

3. At its forty-first session, in 2008, the Commission considered a written report in respect of a project covering the implementation of the New York Convention by States, its interpretation and application, and the requirements and procedures put in place by States for enforcing an award under the New York Convention, based on replies sent by 108 States parties to the Convention (A/CN.9/656 and Add.1). At that session, the Commission welcomed the recommendations and conclusions contained in the report, noting that they highlighted areas where additional work might need to be undertaken to enhance uniform interpretation and effective implementation of the Convention.

4. The Commission agreed that work should be undertaken to eliminate or limit the effect of legal disharmony in that field. The Commission was generally of the view that the outcome of the project should consist in the development of a guide on the New York Convention, with a view to promoting a uniform interpretation and application of the Convention. It was considered that such a guide could assist with problems of legal uncertainty resulting from its imperfect or partial implementation and could limit the risk that practices of States diverged from the spirit of the Convention. The Commission requested the Secretariat to study the feasibility of preparing such a guide. Also at that session, the Commission agreed that, resources permitting, the activities of the Secretariat in the context of its technical assistance programme could include dissemination of information on the judicial interpretation of the New York Convention, which would usefully complement other activities in support of the Convention.[12]

5. The Commission was informed, at its forty-fourth and forty-fifth sessions, in 2011 and 2012, that the Secretariat was carrying out a project on the preparation of a guide on the New York Convention, in close cooperation with two experts, E. Gaillard (Sciences Po Paris, École de Droit) and G. Bermann (Columbia University School of Law), who had established research teams to work on that

[9] *Official Records of the General Assembly, twenty-fourth session, supplement No. 18* (A/7618), para. 107.

[10] Ibid., *Twenty-fifth Session, Supplement No. 17* (A/8017), paras. 151 and 152.

[11] Ibid., *Fifty-third Session, Supplement No. 17* (A/53/17), para. 234.

[12] Ibid., *Sixty-third Session, Supplement No. 17* and corrigendum (A/63/17 and Corr.1), paras. 355 and 360.

project. The Commission had been informed that Mr. Gaillard and Mr. Bermann, in conjunction with their respective research teams and with the support of the Secretariat, had established a website (www.newyorkconvention1958.org) to make the information gathered in preparation of the guide on the New York Convention publicly available. The website was aimed at promoting the uniform and effective application of the Convention by making available details on its judicial interpretation by States parties. The Commission had also been informed that the UNCITRAL secretariat planned to maintain close connection between the cases in the UNCITRAL database on case law relating to UNCITRAL texts (the "CLOUT database") and the cases available on the website dedicated to the preparation of the guide on the New York Convention.[13] At its forty-fifth session, in 2012, the Commission expressed its appreciation for the establishment of the website on the New York Convention and the work done by the Secretariat, as well as by the experts and their research teams, and requested the Secretariat to pursue efforts regarding the preparation of the guide on the New York Convention.[14]

6. At its forty-sixth session, in 2013, the Commission took note of General Assembly resolution 62/65 of 6 December 2007, in which the General Assembly, recognizing the value of arbitration as a method of settling disputes in international commercial relations, contributing to harmonious commercial relations, stimulating international trade and development and promoting the rule of law at the international and national levels, and expressing its conviction that the New York Convention had strengthened respect for binding commitments, inspired confidence in the rule of law and ensured fair treatment in the resolution of disputes arising over contractual rights and obligations, requested the Secretary-General to increase efforts to promote wider adherence to the Convention and its uniform interpretation and effective implementation.[15]

7. It may be recalled that in the resolution 66/94 of 13 January 2012, the General Assembly noted with appreciation the decision of the Commission to request the Secretariat to pursue its efforts towards the preparation of a guide on the Convention.[16] By its resolution 68/106, the General Assembly noted "with appreciation the projects of the Commission aimed at promoting the uniform and effective application of the New York Convention, [...] including the preparation of a guide on the Convention, in close cooperation with international experts, to be submitted to the Commission at a future session for its consideration."

8. At its forty-sixth session, the Commission had before it an excerpt of the guide on the New York Convention for its consideration (A/CN.9/786). Concerns were expressed that a guide would indicate preference for some views over others, and would therefore not reflect an international consensus on the interpretation of the New York Convention. The question of the form in which the guide might be

[13] Ibid., *Sixty-sixth Session, Supplement No. 17* (A/66/17), para. 252; and ibid., *Sixty-seventh Session, Supplement No. 17* (A/67/17), para. 135.

[14] Ibid., *Sixty-seventh Session, Supplement No. 17* (A/67/17), para. 136.

[15] Ibid., *Sixty-eighth Session, Supplement No. 17* (A/68/17), para. 136.

[16] See also General Assembly resolution 67/89 of 14 January 2013, where the General Assembly noted "with appreciation the projects of the Commission aimed at promoting the uniform and effective application of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York on 10 June 1958,[16] including the preparation of a guide on the Convention."

published was therefore raised. In response, it was pointed out that the drafting approach adopted in the preparation of the guide was similar to that of other UNCITRAL guides or digests, such as the Digest of Case Law on the United Nations Convention on Contracts for the International Sales of Goods; as set out in the Foreword to the guide (see below), "[t]he UNCITRAL Guide on the New York Convention does not constitute an independent authority indicating the interpretation to be given to individual provisions but rather serves as a reference tool collating a wide range of decisions from a number of jurisdictions. The purpose of the Guide is to assist in the dissemination of information on the New York Convention and further promote its adoption as well as its uniform interpretation and effective implementation. In addition, the Guide is meant to help judges, arbitrators, practitioners, academics and Government officials use more efficiently the case law relating to the Convention."

9. The Commission requested the Secretariat to submit the guide to the Commission at its forty-seventh session for further consideration of the status of the guide and how it would be published.[17] Pursuant to that request, the present document contains the foreword to the guide. The text of the guide on articles of the Convention is contained in the addenda to this note. The text of the guide on article VII is contained in document A/CN.9/786.

Foreword — UNCITRAL Guide on the New York Convention

From the Final Act of the United Nations Conference in International Commercial Arbitration of 10 June 1958 to the General Assembly resolution 62/65 of 6 December 2007

1. The New York Convention is one of the most important and successful United Nations treaties in the area of international trade law. Although the Convention, adopted by diplomatic conference on 10 June 1958, was prepared by the United Nations prior to the establishment of the United Nations Commission on International Trade Law (UNCITRAL), promotion of the Convention is an integral part of the work programme of UNCITRAL. The Convention is widely recognized as a foundational instrument of international arbitration and requires courts of contracting States to give effect to an agreement to arbitrate when seized of an action in a matter covered by an arbitration agreement and also to recognize and enforce awards made in other States, subject to specific limited exceptions. The Convention entered into force on 7 June 1959, and there are to date 150 States parties to the Convention.

2. The General Assembly adopted on 6 December 2007 resolution 62/65 in which it recognized the value of arbitration as a method of settling disputes in international commercial relations in a manner that contributes to harmonious commercial relations, stimulates international trade and development and promotes the rule of law at the international and national levels. The General Assembly expressed its conviction that the New York Convention strengthens respect for binding commitments, inspires confidence in the rule of law and ensures fair treatment in the resolution of disputes arising over contractual rights and obligations. It

[17] *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 17* (A/68/17), para. 140.

emphasized the necessity for further national efforts to achieve universal adherence to the Convention, together with its uniform interpretation and effective implementation. The General Assembly expressed its hope that States that are not yet parties to the Convention would soon become parties to it, which would ensure that the legal certainty afforded by the Convention is universally enjoyed, and would decrease the level of risk and transactional costs associated with doing business, thus promoting international trade.

3. The General Assembly requested the Secretary-General to increase efforts to promote wider adherence to the Convention and its uniform interpretation and effective implementation. The UNCITRAL Guide on the New York Convention has been prepared with the aim to fulfil that request.

Promoting uniform interpretation of UNCITRAL instruments

4. UNCITRAL, in accordance with its mandate, has undertaken the preparation of the tools necessary for a thorough understanding of the instruments it develops and for their uniform interpretation.

5. One of these instruments, the website www.newyorkconvention1958.org, has been established in order to make the information gathered in preparation of the UNCITRAL Guide on the New York Convention publicly available. By making available a significant corpus of judicial interpretation of the New York Convention by States Parties, as well as information on the ratification of the Convention where available, this website provides legislators, judges, practitioners, parties and academics with a wealth of jurisdictional information that is dynamic and ever-growing. In relation to each case, it contains the full text of the decision, the translation of the decision where relevant, as well as a summary of the cases. It supplements the cases collected in the CLOUT (Case Law on UNCITRAL Texts) database and serves as a primary reference tool underlying the UNCITRAL Guide on the New York Convention.

6. The UNCITRAL Guide on the New York Convention presents the information on the Convention by article. Each section contains a synopsis of the relevant case law for the relevant article, highlighting common views and reporting any divergent approach. The Guide was prepared using the decisions cited in the website www.newyorkconvention1958.org as well as other decisions, fully cited in the footnotes.

7. The UNCITRAL Guide on the New York Convention does not constitute an independent authority indicating the interpretation to be given to individual provisions but rather serves as a reference tool collating a wide range of decisions from a number of jurisdictions. The purpose of the Guide is to assist in the dissemination of information on the New York Convention and further promote its adoption as well as its uniform interpretation and effective implementation. In addition, the Guide is meant to help judges, arbitrators, practitioners, academics and Government officials use more efficiently the case law relating to the Convention.

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8. The guide is the result of the cooperation between Mr. Emmanuel Gaillard and Mr. George Bermann, their research teams, and the UNCITRAL Secretariat. The first edition of the Guide, prepared in 2013-2014, greatly benefited from the

following contributors: Arbitration Institute of the Stockholm Chamber of Commerce (SCC); Associação Brasileira de Estudantes de Arbitragem (ABEArb); Cairo Regional Centre for International Commercial Arbitration (CRCICA); Centre of Documentation of the Italian Supreme Court; Deutsche Institution für Schiedsgerichtsbarkeit e.V. (DIS); DSP Publishing; Federal Court of Australia; High Court of Australia; Incorporated Council of Law Reporting (ICLR); New York International Arbitration Center (NYIAC); Permanent Secretariat, OHADA (Organisation pour l'Harmonisation en Afrique du droit des affaires); Republica e Cantone Ticino; Supreme Court of South Australia; Supreme Court of Tasmania; The People's Court Press (Supreme People's Court of the People's Republic of China) (人民法院出版社); Tribunal de Justiça do Estado de São Paulo; Domenico Di Pietro (Freshfields Bruckhaus Deringer LLP); Anna-Maria Tamminen (Hannes Snellman Attorneys Ltd); Niki K. Kerameus (Kerameus & Partner); Justinas Jarusevicius (Motieka & Audzevicius); Professor Jie (Jeanne) Huang, S.J.D., Associate Professor of Law, Director of Foreign Affairs Department at the Shanghai Institute of Foreign Trade School of Law; Professor Liza Chen, Dean of Law School, Shanghai Institute of Foreign Trade School of Law; Sophie Tkemaladze (MCIArb, ADR Advisor for the Judicial Independence and Legal Empowerment Project (JILEP) implemented by the East-West Management Institute, Georgia); Christoph Liebscher (Wolf Theiss, Vienna, Austria); Charles Poncet (ZPG Avocats); Deyan Draguiev (CMS Cameron McKenna LLP-Bulgaria Branch); Grant Herholdt (ENS (Edward Nathan Sonnenbergs) South Africa); Duarte Gorjão Henriques (BCH Advogados); the network of CLOUT correspondents.